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In the Supreme Court of the United States

JAMES OBERGEFELL, *et al.*, *Petitioners*,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, *et al.*, *Respondents*.

VALERIA TANCO, *et al.*, *Petitioners*,
v.
BILL HASLAM, GOVERNOR OF TENNESSEE, *et al.*, *Respondents*.

APRIL DEBOER, *et al.*, *Petitioners*,
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, *et al.*, *Respondents*.

GREGORY BOURKE, *et al.*, *Petitioners*,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE MATTACHINE SOCIETY OF WASHINGTON, D.C., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Recently Released Documents Reveal the Culture and Language of Animus Against LGBT Americans 5

II. Executive Order 10450 Empowers the Federal Government to Purge Itself of Homosexuals 6

A. The FBI's "Sex Deviate Program" Lays the Groundwork for EO 10450 6

B. Hoover Outs President-Elect Eisenhower's Trusted Political Advisor Arthur Vandenberg, Jr. 8

C. President Eisenhower Issues EO 10450, Leveraging the Sex Deviate Program to Purge Homosexuals from Government Service 11

III. History of the Civil Service Commission ... 13

A. The CSC Office of General Counsel (OGC): Animus in Specific Cases 20

1. *Norton v. Macy* 21

2. The Legacy of *Norton v. Macy* 25

B. The CSC and Later the OPM Continue to Target Homosexuals in the 1970s and 1980s 26

IV. The Case of William Lyman Dew Demonstrates the Extent of the Government's Animus Toward Homosexuals for Over 65 Years 27

A. Government Attempts to Purge the Stain of Homosexuality: The William Dew Story 27

B. The Government's Policy on Homosexuals 31

C. Dew's Petition to the United States Supreme Court 32

D. The Government Settles with Dew and Strengthens Its Policy On Homosexuals. 34

E. Why the *Dew* Case and Other Official Acts of Animus Remain Relevant 37

CONCLUSION 38

TABLE OF AUTHORITIES

CASES

Bowers v. Hardwick,
478 U.S. 186 (1986) 11

DeBoer v. Snyder,
772 F.3d 388 (6th Cir. 2014) 2

Dew v. Halaby,
317 F.2d 582 (D.C. Cir. 1963) . . . . . *passim*

Lawrence v. Texas,
539 U.S. 558 (2003) 11, 37

Norton v. Macy,
417 F.2d 1161 (D.C. Cir. 1969) 21, 22, 23, 25

Romer v. Evans,
517 U.S. 620 (1996) 37

United States v. Windsor,
133 S. Ct. 2675 (2013) 37

Vill. of Arlington Heights v. Metro Hous. Dev. Corp.,
429 U.S. 252 (1977) 4

STATUTES

5 U.S.C. § 7513(a) 21

Civil Service Act,
22 Stat. 403-404 (1883) 13

Veterans' Preference Act of 1944,
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Memorandum from Bernard M. Shanley to Governor Sherman Adams (Apr. 10, 1953), *available at* http://www.mwe.com/info/mattachineamicus/document10.pdf 11

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INTEREST OF AMICUS CURIAE[1]

The Mattachine Society of Washington, D.C. (MSDC) is a non-profit, non-partisan research and educational society that conducts original archival research at The National Archives, U.S. presidential libraries, the Library of Congress, the FOIA Library of the Federal Bureau of Investigation, the Stonewall National Museum and Archives, and other private and public repositories across the country.

The mission of the MSDC is to uncover the often-deleted political histories of lesbian, gay, bisexual and transgender (LGBT) Americans who faced persecution and discrimination at the hands of federal and state governments for over sixty-five years. The MSDC is dedicated to achieving full civil equality for LGBT Americans.

The original MSDC was founded in 1961 by gay civil rights pioneer, Dr. Franklin E. Kameny. It was the first gay civil rights organization in Washington, D.C. Today, MSDC is proud to continue this work at the direction of its officers, Charles Francis and Pate Felts, in collaboration with its pro bono legal counsel, the international law firm of McDermott, Will & Emery LLP.

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[1] Pursuant to Supreme Court Rule 37.3, amicus curiae certifies that counsel of record of all parties consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, amicus curiae affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its decision below, the Sixth Circuit acknowledged the "lamentable reality that gay individuals have experienced prejudice in this country, sometimes at the hands of public officials, sometimes at the hands of fellow citizens." *DeBoer v. Snyder*, 772 F.3d 388, 413 (6th Cir. 2014). In doing so, however, the Court refused to connect that history to "the institution of marriage." *Id.* The history of "prejudice against gays," the Court explained, did not lead "to the traditional definition of marriage." *Id.* Thus, "[t]he usual leap from history of discrimination to intensification of judicial review does not work." *Id.*

Whatever the logic of the lower court's decision, it missed the point. Without question, there is a long-standing and well-documented history of animus against LGBT Americans, and this history has a direct and real connection to the state marriage bans now before this Court. *See, e.g.*, Br. of the Human Rights Campaign and 207,551 Americans as Amici Curiae Supporting Petitioners 16-21 (examining the historical and political context behind the state marriage bans).

But the historical animus against LGBT Americans is much deeper than just one set of laws. For decades, this animus was one of the basic assumptions of American life. It was so persistent, so prevalent, and so instrumental to the way that we structured our institutions, treated our fellow citizens, and organized our lives that, in retrospect, it is often overlooked.

It is the mission of the MSDC to uncover this often overlooked history of animus. The MSDC has sought

to locate and make public the long forgotten and often hidden documents from federal and state governments, presidential libraries, and other private and public institutions, that reveal animus against LGBT Americans. George Orwell is credited with having said, "the most effective way to destroy people is to deny and obliterate their own understanding of their history." The purpose of the MSDC is to ensure that this history of animus is not forgotten.

And that history is very relevant to the current cases before this Court. Original source materials obtained and recently released by the MSDC reveal the backdrop of animus in front of which the states enacted the bans now at issue.[2] For decades, both federal and state governments targeted and persecuted homosexuals, individuals suspected of being homosexual, and even those believed to have engaged in homosexual acts, regardless of actual sexual orientation. The stated rationale shifted over time—from concerns about national security to code words, such as "suitability"—but the point was always the same: government officials, federal and state, high and low, felt a complete revulsion toward homosexuals and wanted to purge the country of even the hint of homosexuality.

Animus, therefore, was a culture. And with that culture came a language. For decades, government officials referred to homosexuality in official, often

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[2] MSDC has requested to lodge the materials, cited herein, with the Clerk pursuant to Supreme Court Rule 32.3. The materials are also available online at http://www.mwe.com/info/mattachineamicus/index.html.

highly confidential or privileged communications, as "unnatural," "uniquely nasty," "immoral," "deviant," "pervert[ed]," and an "abomination." Even the FBI had a term for the program that it designed to rid the government of homosexuals—the "Sex Deviate Program." Once it attached, whether based in fact or mere speculation, the label of homosexuality remained forever fixed. As one senior executive official wrote, "once a homo, always a homo." And, as one state legislature put it, what homosexuals wanted was "recognition." And "recognition" was something to fear.

To be sure, these documents do not mention marriage or the bans now at issue. But, in every way, that is precisely what they are about. To understand whether a law embodies constitutionally impermissible animus, this Court often looks to "circumstantial evidence" such as "historical background." *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). The historical background demonstrated by these original source materials reveals a culture of animus against LGBT Americans, justifications for excluding them from the privileges given to all other Americans, and a revulsion to any form of intimacy between individuals of the same sex. The voices of the government officials in these important documents, and the stories of the victims of these purges, show why government actions grounded in animus cannot stand.

ARGUMENT

I. Recently Released Documents Reveal the Culture and Language of Animus Against LGBT Americans.

Although the MSDC has identified thousands of pages of previously undisclosed government documents, there are three areas that best demonstrate the culture and language of animus against LGBT Americans that are relevant to this Court's review.

First, in the 1940s and 50s, the federal government began a purge of homosexuals from federal service, beginning with the creation of the FBI's Sex Deviate Program and culminating in the adoption and implementation of Executive Order 10450. With the official support and encouragement of the President and the director of the FBI, the federal government instituted a policy of pure revulsion against homosexuals and engaged in a concerted effort to identify and remove them from government service.

Second, the Civil Service Commission (CSC), the predecessor to the Office of Personnel Management (OPM), implemented the purge. In stark and unforgiving terms, officials at the CSC wrote of their policy of excluding homosexuals from federal service. They worked closely with leaders in Congress and the states to ensure that this policy stretched beyond federal agencies. And, when faced with opposition from the courts, the CSC shifted and altered its approach, but with the same purpose—to keep homosexuals from equal status.

Finally, the culture and language of animus went so far that it even extended to those who were

heterosexual, but "suspected" of being homosexual. The case of William Dew demonstrates that better than any other. A black man, married with three children, Dew fought for years to regain his position with the federal government—a position that was taken from him because of acts that he engaged in prior to employment. It took the intervention of this Court to end Dew's ordeal and restore him to his position.

II. Executive Order 10450 Empowers the Federal Government to Purge Itself of Homosexuals.

Under the pretext of protecting national security, President Dwight D. Eisenhower issued Executive Order 10450 ("EO 10450"), declaring that the federal government could deny a citizen employment in "each department or agency of the Government" solely because that person was homosexual. Exec. Order No. 10,450 § 2, 18 Fed. Reg. 2,489 (Apr. 29, 1953). Not only did EO 10450 prevent homosexuals from prospective employment, but it also ordered the heads of all government agencies to reopen old "loyalty" investigations previously authorized by President Harry S. Truman under Executive Order 9835 ("EO 9835") to determine whether current employees were homosexual and, if so, to terminate them. With the stroke of a pen, President Eisenhower legalized the discrimination of homosexuals.

A. The FBI's "Sex Deviate Program" Lays the Groundwork for EO 10450.

At the time of Eisenhower's election in November 1952, the FBI was already conducting "loyalty" investigations of all employees of the federal

government, pursuant to EO 9835. *See* Exec. Order No. 9835 §§ I, IV(1), 12 Fed. Reg. 1,935 (Mar. 25, 1947). Under EO 9835, the FBI could not, however, disqualify someone from federal employment based on homosexuality.[3] Thus, the FBI lacked "investigative jurisdiction" over, in the words of then-FBI Director Hoover, "Sex Deviates." Memorandum from J. Edgar Hoover to All Investigative Employees (Sept. 7, 1951), *available at* http://www.mwe.com/info/mattachineamicus/document1.pdf.

Nonetheless, in a September 7, 1951 memo entitled "Sex Deviates in United States Government Service," Hoover sought to change that. Hoover directed that in the course of "Loyalty of Government Employee cases," "[w]hen information is received . . . indicating the person under investigation is a sex deviate, this allegation should be completely and fully developed and the facts reported." *Id.* at 2. Hoover also instructed his agents that, "when an allegation is received that a present or former civilian employee of any branch of the United States Government is a sex deviate, such information is furnished to the [CSC]." *Id.* at 1.

In addition, Hoover wrote that "[a]ll of the police departments throughout the country were notified . . . to place a notation on the arrest fingerprint card that the subject was an employee of the Federal Government." *Id.* By the time Eisenhower was elected, therefore, Hoover already was amassing a cache of information to use against homosexual

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[3] As described below, the CSC later used an employee's or prospective employee's homosexuality as a disqualifying factor under its own regulations and authority. *See infra* Part III.

employees of the Federal Government. And he was using state and local police as his deputies to gather it.

B. Hoover Outs President-Elect Eisenhower's Trusted Political Advisor Arthur Vandenberg, Jr.

Unfortunately, Hoover used this information with terrifying effect. With the Sex Deviate Program in full effect, Hoover sought to remove one of Eisenhower's most trusted political advisors, Arthur Vandenberg, Jr. Vandenberg was the son of a well-known, and highly-regarded, United States Senator from Michigan. He served as the Chair of "Citizens for Eisenhower," advised Eisenhower at the Republican convention, and managed the release of Eisenhower's tax returns and income statements. *See* James M. Haswell, *Vandenberg Key Aide of Ike at Convention*, Detroit Free Press, July 11, 1952, at 10, *available at* http://www.mwe.com/info/mattachineamicus/document2.pdf; Esther Tufty, *It Was Vandenberg Day*, *available at* http://www.mwe.com/info/mattachineamicus/document2.pdf; Letter from Dwight D. Eisenhower to Arthur Vandenberg, Jr. (Oct. 11, 1952), *available at* http://www.mwe.com/info/mattachineamicus/document3.pdf. To reward Vandenberg for his efforts, on November 27, 1952, Eisenhower named Vandenberg "Secretary to the President." Russell Porter, *Vandenberg Jr. Is Selected As Eisenhower's Secretary*, N.Y. Times, Nov. 27, 1952, at 1. Before he could serve, however, Vandenberg was subject to a loyalty investigation by the FBI.

On December 30, 1952, Hoover and Eisenhower met in New York to discuss the results of Vandenberg's investigation. In a post-meeting memorandum, Hoover

noted that he "mentioned the case of Mr. Arthur Vandenberg and outlined briefly to the General some of the angles of the case which we are now investigating." Memorandum from J. Edgar Hoover to Clyde Tolson et al. 2 (Jan. 5, 1953) [hereinafter Tolson Memo], *available at* http://www.mwe.com/info/mattachineamicus/document4.pdf.

The "angle," of course, was Vandenberg's homosexuality. During the investigation, the FBI learned that Vandenberg was living with a young man who had been arrested "in Lafayette Park on a morals charge." Letter from L.B. Nichols to Clyde Tolson (Dec. 9, 1952), *available at* http://www. mwe.com/info/mattachineamicus/document5.pdf. In turn, Hoover "told the General that Vandenberg had asked that we not interview the young man at present living with Vandenberg until he, Vandenberg, came out of the hospital, to which he had gone for a physical check over the last weekend." Tolson Memo, *supra*, at 2. Eisenhower was thus provided with information to conclude that Vandenberg was, in fact, homosexual. Rather than reveal Vandenberg's homosexuality, Eisenhower told Hoover that, if Vandenberg withdrew from his appointment, Hoover "could inform Vandenberg that no report would be submitted as it would then be a moot question." *Id.*

Instead of having his sexual orientation made public, Vandenberg resigned under the guise of being "ill." Letter from Arthur Vandenberg, Jr. to Dwight D. Eisenhower (Jan. 13, 1953), *available at* http://www.mwe.com/info/mattachineamicus/document6.pdf. Eisenhower replied that he was "very distressed" about Vandenberg's "health" and informed Vandenberg that

"as I know you understand, we have to go ahead with our setup." Letter from Dwight D. Eisenhower to Arthur Vandenberg, Jr. (Jan. 17, 1953), *available at* http://www.mwe.com/info/mattachineamicus/document7.pdf.

Three weeks later, Vandenberg wrote back, informing Eisenhower that he was "ready and anxious to go to work." Letter from Arthur Vandenberg, Jr. to Dwight D. Eisenhower (Feb. 6, 1953), *available at* http://www.mwe.com/info/mattachineamicus/document8.pdf. But Eisenhower was not prepared to have a homosexual in the White House. He ignored Vandenberg's request, pretending that Vandenberg remained ill:

> I am distressed to learn that your physical difficulty has proved so stubborn in its refusal to yield to treatment. Much as we miss you, I am certain that you should obey the doctors implicitly; the longer these things hang on the more difficult they are to cure.
>
> . . . we are now proceeding with reorganization of the whole staff without your inclusion in it. To you I send . . . my most earnest prayer that you will experience an early return to vigorous health.

Letter from Dwight D. Eisenhower to Arthur Vandenberg, Jr. (Mar. 3, 1953), *available at* http://www.mwe.com/info/mattachineamicus/document9.pdf.

The myth persisted in the press as well. On or about April 14, 1953, *The New York Times* reported that Vandenberg requested Eisenhower withdraw his

appointment because "he had been suffering from stomach ulcers and did not know how long the ailment would continue." *Vandenberg Forgoes U.S. Post*, N.Y. Times, Apr. 14, 1953, at 38.

C. President Eisenhower Issues EO 10450, Leveraging the Sex Deviate Program to Purge Homosexuals from Government Service.

Two weeks later, Eisenhower issued EO 10450.[4] The pretext for EO 10450 was "to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security." Exec. Order No. 10,450 § 2, 18 Fed. Reg. 2,489 (Apr. 29, 1953). Section 8(1)(iii) of EO 10450 stated, in relevant part, that:

> The investigations conducted pursuant to this order shall be designed to develop information as

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[4] In advance of issuing EO 10450, White House Counsel Bernard M. Shanley informed Eisenhower's Chief of Staff Sherman Adams that he "talked with Assistant Attorney General Warren Burger, who will have the responsibility of defending any action under [EO 10450]." Memorandum from Bernard M. Shanley to Governor Sherman Adams (Apr. 10, 1953), *available at* http://www.mwe.com/info/mattachineamicus/document10.pdf. Burger, of course, would become the Chief Justice of this Court who wrote a concurring opinion in *Bowers v. Hardwick* stating that homosexuality was "'the infamous crime against nature' as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.'" *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J. concurring) (quoting 4 W. Blackstone, Commentaries *215), *overruled by Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

> to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to . . . [a]ny criminal, infamous, dishonest, *immoral, or notoriously disgraceful conduct*, habitual use of intoxicants to excess, drug addiction, *sexual perversion*.

Id. § 8(1)(iii) (emphasis added). EO 10450 also leveraged the collection of arrest finger print cards collected through Hoover's Sex Deviate Program. *Id.* § 3(a) ("[I]n no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the [FBI]) . . . .").

The stated rationale of EO 10450—"national security"—is belied by its breadth. In fact, EO 10450 was designed to purge the government of certain types of people, including homosexuals. In an article dated February 24, 1954, *The New York Times* reported that of 590 people separated from the State Department, "[n]inety-nine involved 'homosexual deviations' as the principal factor, and 278 similar cases were under investigation with no determinations yet made." *New U.S. Jobs Went to Half Of State Department 'Risks'*, N.Y. Times, Feb. 24, 1954 at 1, 42.[5] Indeed, the

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[5] In March of 1954, the CSC released a report concerning EO 10450 reporting on individuals separated from government service. Though not explicitly tying "sexual perversion" to homosexuality, Philip Young, the Chairman of the CSC reported that approximately 154 government employees were dismissed for "sexual perversion" reasons. *U.S. Dismissed 355 in Subversive Cases*, N.Y. Times, Mar. 2, 1954, at 1, 45.

government used EO 10450 repeatedly to discriminate against homosexuals in the workplace and set an example that states would soon follow.

III. History of the Civil Service Commission.

EO 10450 and the Sex Deviate Program were already powerful tools to implement the policy of running homosexuals out of the federal government. But, when combined with the CSC, the three became a potent poison that spread animus against homosexuals throughout all branches of the federal government and into the States.

Congress established the CSC in 1883 "to create a merit-based federal workforce." Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. Pa. J. Lab. & Empl. L. 225, 230 (2005). To determine the "relative capacity and fitness" or "suitability" of certain federal applicants, Civil Service Act, 22 Stat. 403-404 (1883), the CSC investigated applicants' personal backgrounds, performed in-person interviews of applicants and their colleagues, and ran criminal background checks. U.S. Civil Service Commission, Bureau of Personnel Investigations, *The Investigative and Suitability Programs of the U.S. Civil Service Commission* (Mar. 1969), *available at* http://www.mwe.com/info/mattachineamicus/document11.pdf.

Homosexuality was a bar to federal employment because it prevented an applicant from passing a CSC security investigation under EO 10450. A full investigation by the CSC served "to develop information as to whether the employment of that individual is clearly consistent with the interests of

national security." Memorandum from John W. Steele to O. Glenn Stahl 1 (Nov. 17, 1964) [hereinafter Steele Memo], *available at* http://www.mwe.com/info/mattachineamicus/document12.pdf. Such information would include "any criminal, infamous, dishonest, immoral or notoriously disgraceful conduct" and "any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure." *Id.* John Steele, a supervisor at the CSC, put it this way:

> *[O]ur society generally regards homosexuality as a form of immoral conduct.* Also, our societal attitudes being what they are, a homosexual is extremely vulnerable to blackmail: exposure means public opprobrium, and, in the case of a Government employee the loss of his job. Thus, under the terms of the Order, past or present *homosexuality renders the individual unacceptable for a sensitive position.*

Id. (emphasis added).

But this was not the first time that the United States government had declared homosexuals unfit for government service. For many years, the CSC considered homosexuality under its "general standards on immoral conduct" in its suitability investigations. Memorandum from Kimbell Johnson to Warren B. Irons 1 (Jan. 8, 1965) [hereinafter Johnson-Irons Memo], *available at* http://www.mwe.com/info/mattachineamicus/document13.pdf. For example, as of November 11, 1945, the CSC effectively prohibited the employment of "proven" homosexuals:

> *Homosexuals are not considered suitable persons for Federal employment.* Examples of evidence

> acceptable as proof by the Commission are court records or convictions for some form of perversion, statement to that effect by the employee to co-workers or to his physician, admittance to a hospital for that reason, admission by the employee to a Commission representative or other reliable source of information. . . . [G]enerally[,] debarment is applicable when proof of homosexuality is present.

Id. (emphasis added).

The government's animus toward homosexuals continued through 1950, when the CSC "worked closely with the [U.S. Senate Subcommittee of the Committee on Expenditures in the Executive Department] in *running down the status of homosexuals* who . . . were still employed in the Federal service." *Id.* at 2 (emphasis added). In the wake of this collaboration to ferret out such "sex perverts" from government service, the U.S. Senate Subcommittee concluded:

> *There is no place in the United States Government for persons* who violate the laws or the accepted standards of morality, or who otherwise bring disrepute to the Federal service by infamous or scandalous personal conduct . . . . It is the opinion of this subcommittee that those *who engage in acts of homosexuality and other perverted sex activities* are unsuitable for employment in the Federal Government.

Id. (emphasis added). The Senate emphasized that "the public interest cannot be adequately protected unless responsible officials adopt and maintain a

realistic and vigilant attitude toward the problem of sex perverts in the Government. To pussyfoot or to take half measures will allow some known perverts to remain in the Government . . . ." S. Res. 280, Senate Investigations Subcommittee of the Committee on Expenditures, *Employment of Homosexuals and Other Sex Perverts in Government* (1950) at 21, *available at* http://www.mwe.com/info/mattachineamicus/document14.pdf.

And half measures the government did not take. In 1956, the CSC issued a "Suitability Rating Examiners Handbook," instructing its examiners on how to evaluate whether an individual's sexual orientation barred government employment. Johnson-Irons Memo, *supra*, at 3. "Proof" of homosexuality included "credible information from reliable sources concerning an individual's reputation and conduct." *Id.* The Handbook also provided guidelines for "processing" cases of previously debarred homosexual employees. In those cases, "a careful and thorough examination must be made to determine whether complete rehabilitation has been effected." *Id.* (emphasis in original). Evidence of "rehabilitation" from "sexual deviation" included "severance of association with persons known or suspected of being sexual deviates," "discontinuing the frequenting of places known to be 'hangouts' or residences of sexual deviates," and "the attitude and reputation of the person since corrective action was taken." *Id.* But to remove any doubt, the Handbook stated, "[p]ersons about whom there is evidence that they are homosexuals or sexual perverts . . . *are not suitable for Federal employment*." *Id.* at 2 (emphasis added).

Nor were homosexuals "suitable" for employment in the states. In 1963, the Florida Legislature established a committee to "investigate and report on 'the extent of infiltration into [state] agencies . . . by practicing homosexuals . . . ." Florida Legislative Investigation Committee, *Homosexuality and Citizenship in Florida*, Preface (Jan. 1964) [hereinafter FLIC Report], *available at* http://www.mwe.com/info/mattachineamicus/document15.pdf.

The then-General Counsel of the CSC, L.V. Meloy, contacted the chairman of the Florida Legislative Investigation Committee (FLIC), seeking "several copies" of its report. Letter from L.V. Meloy to Charley Johns (Apr. 30, 1963), *available at* http://www.mwe.com/info/mattachineamicus/document16.pdf. As Meloy explained, the "Federal Government has related problems in this area and . . . [the] investigation will shed additional light on a most difficult problem in suitability for government employment." *Id.* The MSDC has received a copy of the report, titled "Homosexuality and Citizenship in Florida" – a report filled with sensationalism, vitriol, and animosity for the "abomination" of homosexuality and warning that "[a] key homosexual aim is recognition." FLIC Report, *supra*, at 3. The committee went so far as to suggest that "[s]ociety would feel better if there were no homosexuals." *Id.* at 11. The work of FLIC resulted in the removal of at least 37 federal government employees. FLIC, Untitled Document (undated), *available at* http://www.mwe.com/info/mattachineamicus/document17.pdf.

In the spring of 1963, the CSC revised its Suitability Rating Examiners Handbook to clarify that

homosexual conduct—not perceived "homosexual tendencies"—bars someone from employment. Memorandum from Kimbell Johnson to O. Glenn Stahl (May 20, 1963), *available at* http://www.mwe.com/info/mattachineamicus/document18.pdf. Proof of "homosexual conduct" included "credible information indicating that the individual has engaged in or solicited others to engage in such [homosexual] acts with him." U.S. Civil Service Commission, Federal Personnel Manual System Supplement Installment, FPM Supp. No. 731-71 (July 26, 1963), *available at* http://www.mwe.com/info/mattachineamicus/document19.pdf. Yet, if the person "refrained from [homosexual] activities," he or she would remain eligible for federal employment. *Id.* Despite this intrusive inquiry into an individual's private life, the CSC asserted that "it does not consider itself to be the guardian of the public's morals[.]" *Id.*

The exclusion of homosexuals from federal employment continued through the 1960s. In a memorandum to John Steele, Glenn Stahl wrote that the "[CSC] set[s] homosexuality apart from other forms of immoral conduct and take[s] a much more severe attitude toward it." Steele Memo, *supra*, at 2. When it came to other acts of "immoral conduct," the CSC would take into account the seriousness of the conduct. Not the case for homosexuality: the CSC would "automatically find the individual [that has engaged in homosexual acts] unsuitable for Federal employment unless there is *evidence of rehabilitation*." *Id.* (emphasis in original). This led to subjective determinations of an individual's suitability "depending on the strength of the reviewing official's *personal*

aversion to homosexuality," with some examiners concluding "'once a homo, always a homo'":

> Really, we do not apply Commission policy at all; *we apply our own individual emotional reactions and moral standards.* Our tendency to 'lean over backwards' to rule against a homosexual is simply *a manifestation of the revulsion which homosexuality inspires in the normal person. What it boils down to is that most men look upon homosexuality as something uniquely nasty, not just as a form of immorality.*

Id. at 3 (emphasis added).

Less than a year later, representatives of the CSC met with members of the MSDC to discuss the federal government's policy on the suitability of persons "who are shown to have engaged in homosexual acts."[6] Letter from John Macy to MSDC 1 (Feb. 25, 1966), *available at* http://www.mwe.com/info/mattachineamicus/document20.pdf. In its official response, the CSC used language of disgust and animus to justify the exclusion of homosexuals from government employment:

> Pertinent considerations here are the *revulsion of other employees* by homosexual conduct and the consequent disruption of service efficiency, the *apprehension caused other employees* of homosexual advances, solicitations, or assaults, *the unavoidable subjection of the sexual deviate* to erotic stimulation through on-the-job use of common toilet, shower, and living facilities, the

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[6] In attendance for the MSDC were Dr. Franklin E. Kameny and Lilli Vincenz, among others.

> *offense to members of the public who are required to deal with a known or admitted sexual deviate* to transact Government business, the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularity among the youth, and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society.

Id. at 2 (emphasis added).

"To be sure," the letter concluded, "if an individual applicant were to publicly proclaim that he engages in homosexual conduct, that he prefers such relationships, that he is not sick, or emotionally disturbed, and that he simply has different sexual preferences . . . the Commission would be required to find such an individual unsuitable for Federal employment." *Id.* at 4.

Multiple documents uncovered by the MSDC refer to this letter as the CSC's "official policy" on the employment of homosexuals.

A. The CSC Office of General Counsel (OGC): Animus in Specific Cases.

Despite this relentless and persistent history of animus against homosexuals, federal courts sought to step in and right the wrongs imposed on particular individuals. Unfortunately, recently uncovered documents show that the CSC fought these decisions at every turn.

1. *Norton v. Macy*

One example is the case involving Clifford Norton, a veteran and budget analyst with NASA.[7] *Norton v. Macy*, 417 F.2d 1161, 1162 (D.C. Cir. 1969). Norton was arrested by two Morals Squad officers for a traffic violation after picking up another man, driving once around Lafayette Square in Washington, D.C., and then dropping the man off again. *Id.* The officers arrested both men and interrogated them for two hours about their activities and sexual histories. *Id.* The head of the Morals Squad then telephoned NASA Security Chief Fugler who arrived at 3:00am. *Id.* Fugler and a colleague then continued to interrogate Norton until 6:00am. *Id.* at 1163.

Under intense, all-night questioning, Norton confessed that "he might have engaged in some sort of homosexual activity" after drinking on two prior occasions. *Id.* As a result, NASA removed Norton for engaging in "immoral, indecent and disgraceful conduct." Memorandum from Anthony L. Mondello to Chairman Robert Hampton 1 (July 1, 1969) [hereinafter Mondello-Hampton Memo], *available at* http://www.mwe.com/info/mattachineamicus/document21.pdf. Norton's supervisor "was not worried about any possible effect on [Norton's] performance and went so far as to inquire of personnel officers 'if there was any way around this kind of problem for the man.'" *Norton*, 417 F.2d at 1166-67. While Norton did not pose any security concerns, NASA nonetheless

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[7] As a veteran, the government could only dismiss Norton "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a); *Norton v. Macy*, 417 F.2d 1161, 1162 (D.C. Cir. 1969).

terminated him because "dismissal for any homosexual conduct was a custom within the agency . . . and continued employment of [Norton] might 'turn out to be embarrassing to the agency' . . . ." *Id.* at 1167.

Although the federal district court approved Norton's termination, the Court of Appeals reversed. According to the Court, NASA's decision to terminate Norton could be "a smokescreen hiding personal antipathies or moral judgments which are excluded by statute as grounds for dismissal." *Id.* The Court went on to state:

> Lest there be any doubt, we emphasize that we do not hold that homosexual conduct may never be cause for dismissal of a protected federal employee. Nor do we even conclude that potential embarrassment from an employee's private conduct may in no circumstance affect the efficiency of the service. What we do say is that, if the statute is to have any force, an agency cannot support a dismissal as promoting the efficiency of the service merely by turning its head and crying shame.

Id. at 1168. In other words, the decision required a "nexus" between homosexual conduct and job performance.

But this was a standard that became increasingly difficult for the CSC to meet. The day the *Norton* decision came down, the CSC General Counsel, Anthony Mondello, promptly complained about the decision:

> The significance of this decision is that the court says we must show a connection between the

> evidence against the employee and the efficiency of the service to justify a removal for homosexual conduct.

Mondello-Hampton Memo, *supra*, at 1. Mondello pointed out that "the court noted that it was possible that homosexual conduct of an employee might bear on the efficiency of the service. . . . It might in some circumstances be evidence of an unstable personality, unsuited for certain kinds of work." *Id.* at 2. He also emphasized that "[i]f the employee made offensive overtures while on duty or if his conduct were notorious, the reactions of other employees and of the public with whom he came in contact might be taken into account." *Id.*

Several weeks later, Mondello wrote to William Ruckelshaus, Assistant United States Attorney General, urging the government to seek review of the Appeals Court's reversal of *Norton v. Macy*. Memorandum from Anthony L. Mondello to William Ruckelshaus (July 16, 1969), *available at* http://www.mwe.com/info/mattachineamicus/document22.pdf. Mondello urged review based on a misapplication of the rational basis standard. *Id.* at 2. Mondello wrote:

> The majority opinion ignores the realities of the civil service by virtually overriding the long-standing legislative and executive policy that "good character" is as much a qualification for public employment as the skill and competence that are needed in order to perform the duties of a particular position. The efficiency of the service encompasses much more than the

> objective of satisfactory performance of particular tasks by individual employees.

Id. at 3.

In a blatant display of his own animus, Mondello claimed that "[t]here would be a gradual deterioration of the civil service if it were commonly known that persons who repeatedly engaged in serious misconduct offensive to community standards were appointed or retained in Federal agencies. Government employment would be less attractive as a career and the quality of applicants would deteriorate." *Id.*

Mondello even set out a historical argument for the CSC's continued animus toward homosexuals. He argued "[i]ndeed as early as 1871 Congress made it clear that the fitness of applicants for Federal employment is to be judged on the basis of the 'character' of the applicants, as well as upon their ability to perform the tasks assigned." *Id.* at 3. The "character of the individual was one of the factors to be considered in selecting applicants for appointment to civil service, so that 'immoral and unscrupulous men who lowered the public's respect for the Service' might be excluded." *Id.* at 4.

The Attorney General's Office ultimately chose not to appeal.

2. The Legacy of *Norton v. Macy*.

But this did not end the CSC's obsession with the case. Indeed, the Commission remained worried about the impact of *Norton v. Macy* and Mondello acknowledged as much:

> We have been taking our lumps in the courts on suitability cases notably those involving homosexuals . . . . We lost most of the cases because of our inability to meet the *Norton* case test which the district courts have accepted as a requirement of showing on the record that the outside conduct of a given individual impedes the efficiency of his job performance or service. So far we have not had a court case where we are so correct on the facts that we can present the *Norton* issue again in order to obtain a court ruling that the "efficiency of the service" is a broader concept than merely the capability of an individual to perform his particular job.

Memorandum from Anthony L. Mondello to Chairman Robert Hampton 1 (Mar. 4, 1971), *available at* http://www.mwe.com/info/mattachineamicus/document23.pdf.

In April 1971 Mondello again analyzed whether the Commission could defend its dismissals for homosexual conduct, concluding that "[t]he suits appear to be indefensible and could, if pursued, provide a vehicle for issuance of legal decisions we could not live with." Memorandum from Anthony L. Mondello to Chairman Robert Hampton 1 (Apr. 6, 1971), *available at* http://www.mwe.com/info/mattachineamicus/document24.pdf. Mondello realized that the CSC could not defend its own actions in court when the basic question

was "what has my private sex life got to do with working in the Post Office?" or other federal agencies. *Id.*

B. The CSC and Later OPM Continue to Target Homosexuals in the 1970s and 1980s.

By the 1970s, the Commission had reluctantly slowed its purge of homosexuals from the federal workforce. The courts forced the CSC to justify terminations by showing an actual connection between the conduct and the "efficient performance" of the federal agency. Letter from Margery Waxman to Rep. J.J. Pickle 2 (June 26, 1980), *available at* http://www.mwe.com/info/mattachineamicus/document25.pdf. In 1973, the CSC notified federal agencies that homosexuality was not "per se grounds of unsuitability." *Id.* (emphasis in original). In 1977, the OPM – the successor agency to CSC – dropped the word "immoral" in its policy statements, even though it retained the power to fire homosexuals for "criminal, dishonest, infamous or notoriously disgraceful conduct." *Id.* at 2.

By 1980, the General Counsel of OPM, Margery Waxman, acknowledged that—notwithstanding the OPM's continued efforts to include homosexuality as a basis for discharging a federal employee—"the courts have shown a clear tendency to be offended by the removal of low grade employees on the ground of homosexuality[.]" Letter from Margery Waxman to Alice Daniels 2 (Feb. 14, 1980), *available at* http://www.mwe.com/info/mattachineamicus/document26.pdf. Nonetheless, a year later, Waxman wrote that the "collection of information regarding one's

sexual preference in connection with a national security investigation is not inconsistent with the OPM Policy Statement." Memorandum from Margery Waxman to Peter Garcia 1 (Jan. 26, 1981), *available at* http://www.mwe.com/info/mattachineamicus/document27.pdf. Even as late as 1981, OPM still considered it acceptable to inquire into an employee's private sexual activities and preferences under the guise of "national security." While much had changed by 1981, much had nonetheless remained the same. And with the emergence of the AIDS crisis, the adoption of Don't Ask Don't Tell, the Defense of Marriage Act, and the state marriage bans now at issue, the culture of animus remains very much in place.

IV. The Case of William Lyman Dew Demonstrates the Extent of the Government's Animus Toward Homosexuals for Over 65 Years.

Like Clifford Norton, the federal government also sought to remove William Dew from federal service. And, like Norton, it was the courts—indeed, this Court—that provided Dew protection from a government policy of animus and discrimination.

A. Government Attempts to Purge the Stain of Homosexuality: The William Dew Story.

From 1951 to 1955, William Dew served his country in the U.S. Air Force and became eligible for benefits pursuant to the Veterans' Preference Act of 1944, 5 U.S.C. § 851, *et seq*. (1958). Dew's initial employment with the federal government began with the Central Intelligence Agency (CIA) as a file clerk. *Dew v.*

Halaby, 317 F.2d 582, 583 (D.C. Cir. 1963). To obtain the necessary security clearance for this position, the agency required him to submit to a polygraph examination. *Id.* During that examination, Dew admitted to having committed at least four "unnatural sex acts with males" in 1950 when he was approximately 18 or 19 years old and a college student. *Id.* Thereafter, Dew was permitted to resign his position with the CIA. *Id.*

Subsequently, Dew applied to and was accepted for employment with the Civil Aeronautics Authority (CAA), the predecessor agency of the Federal Aviation Authority (FAA). *Id.* On September 17, 1956, Dew was appointed as an Airway Operations Specialist, subject to the standard one-year probationary period and "to investigation." *Id.* After successfully serving in this role for nearly two years as an air traffic controller in Denver, well beyond the one-year probationary period required under federal regulations, and having received a satisfactory performance evaluation and a promotion, CAA told Dew that it planned to remove him from service. *Id.*

No doubt, this young air traffic controller with a bright future, a wife, and a baby on the way, was shocked when he received the May 14, 1958 letter that his employer thought him "unsuitable" for his position "by reason of having engaged in acts of disgraceful personal conduct." Letter from W.P. Plett to William L. Dew (May 14, 1958), *available at* http://www.mwe.com/info/mattachineamicus/document28.pdf. The letter detailed the various pre-employment acts of homosexuality which Dew had previously admitted. *Id.* at 1. The CAA's position was that "if known, [these

acts] would have barred your appointment." *Id.* The information had been provided to the CAA following a "special interview" conducted by Glyndon M. Riley, Deputy Chief, Personnel Division of the CAA in Denver. *Id.* at 2. Dew made no effort to hide his past acts of same-sex conduct and even signed a statement verifying the allegations. *Id.* On May 26, 1958, the CAA advised Dew of its decision to terminate him. Letter from W.P. Plett to William L. Dew (May 26, 1958), *available at* http://www.mwe.com/info/mattachine amicus/document29.pdf.

For the next six years, Dew engaged in a legal battle with the CAA in an effort to get his job back. Following his removal, he lost his income and could not get work. Hr'g Tr. on the Section 14, Veterans' Preference Act Appeal of William L. Dew 13 (July 23, 1958) [hereinafter Hearing Transcript], *available at* http://www.mwe.com/info/mattachineamicus/document30.pdf. He appealed the removal decisions to the CAA and the CSC, both of which affirmed. *Dew*, 317 F.2d at 583. He twice brought suit in the federal district court in D.C., where he prevailed the first time on a procedural issue. In 1960, Dew appealed the agency removal decisions a second time but this time, the district court granted summary judgment for the government and upheld the CSC's removal. In its decision, the Court noted that "a person who has engaged in sexual deviation in the form of homosexuality shows certain weaknesses of character, to say the least." Br. of Resp'ts in Opp'n to Pet. for Cert. at 5-6, *Dew v. Halaby*, No. 458 Misc. (U.S. Oct. Term 1963) [hereinafter Cox Brief], *available at* http://www.mwe.com/info/mattachineamicus/document31.pdf.

In 1962, Dew appealed to the U.S. Court of Appeals for the District of Columbia, arguing that his removal was against certain CSC Regulations in place at the time. *Dew*, 317 F.2d at 585. The Court of Appeals ruled against Dew and refused to overturn the CAA's authority to "remove an employee when his 'conduct or capacity' is such that his removal will promote the efficiency of the service" within the meaning of the Veteran's Preference Act and the CSC Regulations. *Id.* at 587-88. The court relied on "the nature of appellant's duties" and the fact that his "position requires skill, alertness and above all responsibility." *Id.* at 587.

The court, however, mistakenly stated that "the present case is the unfortunate one of a new employee *with something to hide*." *Id.* at 588 (emphasis added). But this was hardly the case. Dew had previously admitted the underlying sexual acts to both of his employers, the CIA and the CAA. The Court ignored these facts, which negated any national security concerns because there were no secrets for which Dew could be blackmailed. The Court also ignored expert psychiatric testimony that Dew did not suffer from a "homosexual personality disorder," and that the incidents at issue were "isolated" and "primarily the result of his curiosity." Hearing Transcript, *supra*, at 7, 11. The Court of Appeals, like the CAA and CSC, also disregarded evidence of Dew's "rehabilitation" as demonstrated by the fact that he was happily married to a woman who was pregnant with their first child at the time of the initial administrative hearing, and was pregnant with their third child by the time of the appeal to the Court of Appeals. Hearing Transcript, *supra*, at 13; Br. for Appellant at 6 n.5, *Dew v. Halaby*,

317 F.2d 582 (D.C. Cir. 1963) (No. 16741), *available at* http://www.mwe.com/info/mattachineamicus/document32.pdf. The Court's bias against Dew and support of the government's policy against homosexuals were evident when it concluded its decision by saying it was in "no position to say that retention of the appellant, *demonstrated to have evidenced a lack of good character in the past, would promote, or would not have a derogatory effect on, the efficiency of the service*" without any basis in the record to draw such a conclusion. *Dew,* 317 F.2d at 589 (emphasis added).

B. The Government's Policy on Homosexuals.

Unfortunately, this decision was consistent with the government's longstanding policy on homosexuals. *See supra* Part III; Johnson-Irons Memo, *supra*, at 1. The Court of Appeals decision in *Dew* tacitly approved this policy by holding "for the first time . . . that a permanent civil service worker, including one with veteran's preference, can be fired for pre-employment acts unrelated to his Governmental service." *Dew*, 317 F.2d at 589-590 (Wright, J., dissenting). Judge Wright called this decision to remove Dew from his position with the CAA for what it really was:

> If this ruling remains the law, no civil service job is safe. Any civil service worker who becomes *persona non grata* with the powers that be may have some historical research made on his pre-employment background in an effort to turn up something 'disqualifying.' . . . The mere threat of this kind of inquiry would be sufficient in most

> cases to cause the resignation of the worker marked for dismissal.

Id. at 590 (emphasis in original).

Dew was "marked for dismissal" because of his past acts of homosexual conduct. But there was no connection between Dew's pre-employment conduct and his satisfactory performance as a civil service employee, as admitted by the government in every proceeding. *Id.* at 591. Nor was there any evidence to support a finding that Dew's past conduct would have adversely impacted his co-workers which, in turn, would have had adverse effects on the promotion of the efficiency of service. *Id.* Indeed, "there [was] no evidence that fellow employees knew of Dew's prior acts or found him to be obnoxious." *Id.* at 591 n.12. Dew was not a homosexual and there was undisputed expert testimony that he was in all respects "normal." *Id.* at 591.

C. Dew's Petition to the United States Supreme Court.

Dew petitioned this Court on August 2, 1963. The MSDC uncovered the brief in opposition to Dew's petition filed by Solicitor General Archibald Cox. The Cox Brief, *supra*. In that brief, Cox characterized homosexuality as a "personality disorder", and acts of homosexuality as "acts of disgraceful personal conduct." *Id.* at 3, 6. The Cox Brief further depicted gay people as deeply disturbing to fellow employees, notwithstanding the absence of any evidence in support of this statement, and of questionable reliability to perform a job dealing with the safety of passengers and crew of commercial airplanes. *Id.* at 6, 8. Cox wrote:

> One reason for such disqualification would be that petitioner's prospective co-workers *might* be disturbed or adversely affected by the presence of a person who had committed immoral acts of the kind here involved. Another reason *might* be that the bare commission of these acts raises legitimate doubts as to petitioner's reliability. In either event, it would not be irrational for the agency to conclude that its efficiency might be impaired.

Id. at 8 (emphasis added).

Cox attempted to justify rejection of an applicant for civil service "with a history of this kind" even where the history is not made known until after the start of employment. *Id.* Cox acknowledged that Dew's work performance was satisfactory, a fact that was never disputed, and while this was "some evidence of his reliability, [this] does not completely overcome the doubts concerning strength of character which are raised by his earlier willingness to engage in the questionable activity." *Id.*

Cox made no attempt to cover up the animus inherent in the government's treatment of Dew and "his kind":

> Nor does the undisputed fact that petitioner does not now manifest any homosexual personality disorder . . . fully rebut the inference that he is more susceptible to the temptations of immoral and disgraceful conduct than others.

Id. On February 17, 1964, the United States Supreme Court granted Dew's Petition for Certiorari.

D. The Government Settles with Dew and Strengthens Its Policy On Homosexuals.

In December 1964, the Solicitor General's office and the CSC settled with Dew following the granting of Dew's petition by this Court. *See* Stip. for Dismissal of Writ of Cert., *Dew v. Halaby* (U.S. Oct. Term 1964) (No. 64), *available at* http://www.mwe.com/info/mattachine amicus/document33.pdf. Dew was reinstated and received "$12,000 in back wages, 'so justice can be done.'" *See* James Ridgeway, *The Snoops: Private Lives and Public Service,* The New Republic, Dec. 19, 1964, at 13, 17, *available at* http://www.mwe.com/info/mattachine amicus/document34.pdf. Halaby, the FAA Administrator and one of the named respondents in Dew's case, said that "[r]ecent tests had shown that Dew is 'fully rehabilitated and competent . . . and should not be scarred for life for a youthful mistake.'" *Id.* at 17. This was the same information known to the government at the outset of its investigation. The government offered no explanation for the departure in the *Dew* case from its own policy on rehabilitation.

In reality, Cox and the CSC settled with Dew to avoid having to test the government's position that it may remove a preferred veteran based on pre-employment acts. *Id.* Worse still was the concern that the government's investigations and policies regarding its suitability standards for employment would come under scrutiny and attack.

Indeed, the government's "pardon" granted to Dew on the heels of this Court's grant of certiorari only served to fuel governmental animus toward actual and perceived homosexuals for many years to come.

Indeed, many viewed the outcome of the *Dew* case as a setback for the CSC. A few days following the settlement, Meloy wrote to Johnson regarding the CSC's methods of removing homosexuals from service. *See* Memorandum from L.V. Meloy to Kimbell Johnson (Dec. 24, 1964), *available at* http://www.mwe.com/info/mattachine amicus/document35.pdf. Meloy specifically referenced the *Dew* case in the memo noting "there is much we can do in house with respect to cases involving immoral conduct." *Id.* at 2. Meloy further noted that the existing suitability standard provided for consideration of a person's rehabilitation and offered that Cox "thought the record in the *Dew* case contained sufficient evidence of rehabilitation that he was unwilling to support the government's position before the Supreme Court." *Id.* at 3.

On January 12, 1965, a few weeks after the settlement, high-ranking members of the CSC met to discuss the issues connected with the government's homosexual investigations, and in particular, "*Dew v. Halaby*—its significance in terms of both policy and appeals procedures." *See* Routing Slip Memorandum from L.V. Meloy to O.Glenn Stahl (Jan. 8, 1965), *available at* http://www.mwe.com/info/mattachineamicus/document36.pdf. In connection with this January 12, 1965 meeting, Johnson prepared a memo outlining the evolution of the CSC's "policy on homosexuality." *See id.* Following the January 12, 1965 meeting, the suitability rating standard for employment with the government was enhanced with a view toward "requiring more evidence to reach a conclusion of homosexuality or sexual perversion" to "strengthen the record and lift it out of the realm of supposition and conjecture." Memorandum from L.V. Meloy to Kimbell

Johnson and O. Glenn Stahl (Jan. 13, 1965), *available at* http://www.mwe.com/info/mattachineamicus/document37.pdf. Meloy offered, "At least it is worth a try." *Id.*

Other members of the CSC must have agreed with Meloy. The CSC followed Meloy's recommendation, and changed its rating standard for homosexuals to "make it plain that there must be clear and definite information to support a conclusion of homosexuality or sexual perversion." *See* CSC, Rating Standard for Homosexuals and Sexual Perversion, FPM 731-3 (Mar. 8, 1965), *available at* http://www.mwe.com/info/mattachine amicus/document38.pdf.

The lessons learned by the government from the *Dew* case had nothing to do with accepting diversity in the American workforce or employing the best people for the job. Rather, the *Dew* case taught the government that it had to tighten its procedures and find other ways to continue to ban LGBT Americans from public employment. The government demonstrated its willingness to use all of its resources to crush homosexuals and those who engaged in homosexual acts with its suitability standards. Never was a case of animus against a group of citizens so obvious, and the irony is that Dew was not even a homosexual.

E. Why the *Dew* Case and Other Official Acts of Animus Remain Relevant.

The *Dew* case is important for another reason as well—one that goes to the heart of the cases now before this Court. For decades, there was no limit to the animus meted out against LGBT Americans and no end to its reach. It poisoned every institution in the United States and seeped into the lives of all Americans, not merely those of gays and lesbians. So too, the language of animus became commonplace among those in the highest positions in government: "homo," "sexual deviant," "pervert," "abomination," "uniquely nasty," and other derogatory terms and phrases were used with bureaucratic ease as a way to define, cabin, and limit the citizenship of LGBT Americans. As the *Dew* case perfectly illustrates, the animus even extended to those who were not gay.

It was the courts—and in the case of *Dew*, this Court—that ultimately stepped in to set the course right. This Court knows animus when it sees it, and it has a well-established line of cases overturning laws that by their text, background history, and effect, relegate a class of citizens to second-class status. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *United States v. Windsor*, 133 S. Ct. 2675 (2013). Indeed, this Court has already recognized the long history of discrimination and animus against homosexuals. *See, e.g.*, *Lawrence*, 539 U.S. at 571.

The newly revealed documents cited herein merely reinforce what this Court already knows. For decades, there was a culture of animus against LGBT Americans that permeated every aspect of American

life and every American institution. In many places, that culture continues to this day. To say that the marriage bans now at issue are not somehow the product of this historical animus is to ignore reality. We may not see the air that feeds the flame. But, for decades, animus against LGBT Americans fed the flames of hatred, revulsion, and disgust from which the current marriage bans arose.

CONCLUSION

For the reasons set forth above and in the briefs of the Petitioners, this Court should reverse the decision of the Sixth Circuit.

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